Supreme Court, U.S.
FILED

001818 MAR - 5 2001

OFFICE OF THE CLERK

NO. _____

In The

Supreme Court of the United States

October Term, 2000

WILLIAM E. LEYS, JR.,
Petitioners,

versus

WELLS FARGO ARMED SERVICE CORP.
& PHILLIP KING, et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

William E. Leys, Jr. (Pro se)
3823 San Juan Dr.
Mobile, AL 36609
(334) 344-7330

---

45 pp

QUESTIONS PRESENTED

1. Since the Wells Fargo application for employment and the page that contains the arbitration agreement were never dated, does this void the arbitration contract, in light of the FAA's purpose to reverse longstanding judicial hostility to arbitration agreements and to place them on the same footing as other contracts?

2. Since the page that contains the arbitration agreement was not read or signed until after plaintiff-appellant already began employment, would a working relationship already have been established therefore voiding the arbitration agreement?

3. Is plaintiff-appellant bound by the arbitration agreement when, in fact, he had clocked out for the day and was not under the controls of employment when he was held and interrogated by defendants, nor did he ever return to work after the interrogation when other discovered claims had occurred in his absence?

4. Since § 9 U.S.C. sec. 2 provides that an arbitration agreement may be revoked on the grounds of law or in equity, and the 11th Circuit has only limited circuit law to

QUESTIONS PRESENTED - Continued

judge upon, shouldn't the arbitration agreement have been revoked on the grounds of equity, especially considering the inherent penalty provisions and limiting of remedies which in of itself constitutes an unfair forum for any relief of any type of claim?

5. Should this case have been tried before a judge and jury, especially when other related suits filed by Wells Fargo employees of the same job description were not arbitrated at all?

6. Did the arbitration proceed pursuant to the rules of the American Arbitration Association rules, in that the arbitrator was a business/insurance attorney and was not experienced in the field of employment law, and thus qualifying the arbitral award to be vacated?

7. Since there is no brief, informal discussion of the factual and legal basis for the arbitrators' decision(s), should the arbitral award be vacated pursuant to § 5 U.S.C. sec. 580?

QUESTIONS PRESENTED- Continued

8. Since the arbitral award references the complaints of Fair Credit Reporting Act violations and Privacy Act violations, which are statutory rights, shouldn't these complaints be reserved for trial since there is a standing complaint filed with the Federal Trade Commission?

9. Should the statutory claims mentioned in (8) be reserved for trial since the 11th Circuit has ruled that the arbitration clause contains provisions, which are "clearly unenforceable when it precludes a plaintiff-appellant from vindicating federal statutory rights"?

10. Should our courts discriminate just because a claim is common law rather than statutory law when arbitration is involved, especially since arbitration is supposed to be just as fair a forum as our courts, and that millions of working Americans may be subjected to arbitration and the inherent hidden evils as in this case?

11. Since plaintiff-appellants' counsel untimely removed himself from this case, and thus precluding plaintiff-appellant from timely discovery in district court, should he be able to revisit the district court to reactivate his case

Questions Presented-Continued

under the unique circumstances doctrine?

12. Did the 11th Circuit err by not granting the petition for rehearing en banc when in fact, the petition proved that a potential for a miscarriage of justice would be great and that the issues involved in this case would affect millions of American workers who signed applications that contain an arbitration agreement?

13. Should the "unique circumstances" doctrine excuse plaintiff/petitioner from invited error since the district court led him to believe that the only forum for his claims (statutory right or common law) was arbitration?

14. Did the 11th Circuit err by not considering that plaintiff/petitioner's workman's compensation claim was compromised by the Wells Fargo's slanderous written communications with the workman's compensation offices, and therefore giving plaintiff/petitioner the chance to go to court with his claim of slander?

15. Since we as Americans are guaranteed "Equal Justice Under The Law", does our court system have a moral obligation to safeguard this guarantee by not letting

QUESTIONS PRESENTED – Continued

an inferior forum such as arbitration undermine our rights under the 7th Amendment?

RULE 29.1 STATEMENT

Wells Fargo Armed Services Corporation was doing business and operating in the state of Alabama, under the rules and laws of the state of Alabama. In 1995 Wells Fargo became Loomis Fargo & Company by way of merger.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i-v

RULE 29.1 STATEMENT.....v

TABLE OF AUTHORITIES.....viii

OPINIONS BELOW.....2

JURISDICTION.....2

STATEMENT OF THE CASE.....3

A. Course of Proceedings Below.....3-4

B. Facts Pertaining to Case.....4-7

C. District Court's Decision.....7-12

D. Eleventh Circuit's Decision.....12-30

REASONS FOR GRANTING THE PETITION.....30

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THE ELEVENTH CIRCUIT HAS DECIDEDAN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.....30

CONCLUSION.....30

APPENDIX

Eleventh Circuits Opinion.....1a-7a

The District Court's Dismissal Without Prejudice.....1b-4b

The District Court's Order.....5b

TABLE OF AUTHORITIES

Page

Cases:

Baravati vs. Josephthal, Lyon & Ross, Inc., and Peter Sheib / Case No. 93-3647 (7th Cir. 1994).....15

Cole vs. Burns International Security Services, et al. / Case No. 96-7042 (D.C. 1997).....9,14,28

Miller vs. Public Storage Management, Inc. / Case No. 96-10670 (5th Cir. 1997).....13

Minor v. Wells Fargo / Civil Action No. 94-0799(USDC Eastern Dist. LA).....30

Narey v. Dean, 32 F.3.d 1521, 1526-27 (11th Cir.).....27

Paladino vs. Avnet Computer Technologies, Inc. / Case No. 96-2341 (11th Cir. 1998).....9,16,28

Powers vs. United States Postal Service, 671 F. 2d 1041 (7th Cir. 1982).....15

Randolph vs. Green Tree Financial Corp. / Case No. 98-6055 (11th Cir. 1999).....13,16

Shankle vs. B-G Maintenance Management of Colorado, Inc. / Case No. 97-1130 (10th Cir. 1999).....14

Trabal v. Wells Fargo/ Civil Action No. 98-858 (USDC of New Jersey).....30

TABLE OF AUTHORITIES - Continued

Page

Watkins v. Wells Fargo / Case No. 96-145856-92
(Tarrant County, TX District Court).....30

Statutes:

5 U.S.C. § 580.....28

9 U.S.C. § 2.....29

9 U.S.C. § 10(4).....28

No._____

_____♦_____

In The

Supreme Court of the United States

April Term, 2001

_____♦_____

WILLIAM E. LEYS, JR.,
Petitioner,

versus

WELLS FARGO ARMED SERVICE CORPORATION
& PHILLIP KING,
Respondent.

_____♦_____

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

_____♦_____

PETITION FOR A WRIT OF CERTIORARI

_____♦_____

Petitioner William E. Leys, Jr. (Leys), respectfully petitions for a writ of certiorari to review the judgment of

the United States Court of Appeals for the Eleventh Circuit, as well as the judgment of the United States District Court for the Northern District of Alabama, Southern Division.

OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed the district court's order removing this case to Federal Jurisdiction, compelling arbitration, confirming the arbitrator's decision, and dismissing this action with prejudice. *Leys v. Wells Fargo* /D.C. Case No. 96-02677 CV-C-S / 11th Cir. 98-6988-II (1998) (appended hereto, 1a- & 1b-). The Eleventh Circuit possessed jurisdiction under the "unique circumstances" doctrine on June 29, 1999. The United States District Court for the Northern District of Alabama under 28 U.S.C. 1332 (diversity) and, the Federal Arbitration Act under interstate commerce provisions found at section 2.

JURISDICTION

The Eleventh Circuit rendered its judgment in this case on December 4, 2000, giving this Court jurisdiction.

STATEMENT OF THE CASE

A. Course of Proceedings Below

This case arises from an incident, which first occurred while plaintiff/petitioner (Leys) was an employee for defendants/respondents (WF). Leys was accused of stealing $20,000.00 from an ATM he regularly serviced. Leys filed a claim of slander against WF in Jefferson County Circuit Court, which was then removed to the U.S. District Court of Alabama for the Northern District based on diversity and, a provision in the Federal Arbitration Act addressing interstate commerce. WF then moved for a stay of the proceedings and asserted arbitration as their defense. The district court compelled Leys to arbitrate his claims. Leys took his claims to arbitration on January 28, 1998. The arbitral award was made on March 27, 1998, ruling that WF was not liable. Both parties moved to reactivate the case in district court *nunc pro tunc.* WF moved to enforce the arbitral award, but Leys moved that the arbitration, and the arbitration clause were inherently unfair. The district court enforced the arbitrator's decision on August 31, 1998. Leys fired his counsel on August 21,1998 and became pro se in this case. However, Leys

A. Course in Proceedings Below – Continued

was not able to file a timely appeal or engage in discovery to present to the district court because his ex-counsel, Richard C. Shuleva failed to timely remove himself from this case until November 6, 1998 (granted on December 15, 1998). Leys filed a motion for reconsideration and a motion for leave to amend complaint on September 15, 1998, which were both denied. Leys also filed a motion for leave to hire counsel and a motion for extension to file appeal on November 2, 1998. The district court denied the motion to hire counsel but granted the extension to file appeal "30 days, good cause shown". Ley's appeal was filed on December 12, 1998. WF challenged the Eleventh Circuit citing that the appeal was untimely, but under the "unique circumstances" doctrine, this appeal was allowed to proceed on June 29, 1999. The Eleventh Circuit Court of Appeals affirmed the district court's judgment on August 25, 2000, and subsequently denied Ley's petition for rehearing en banc on December 4, 2000.

B. Facts Pertaining to Case

Petitioner William E. Leys, Jr., (Leys) applied for employment with Respondent Wells Fargo Armed Services Corporation (WF) on August 23, 1993. Leys was hired

B. Facts Pertaining to Case - Continued

before he could finish the application process and was going out on ATM service routes with his supervisor. On or about August 6, 1993, Leys read and signed an extension of the application titled "AUTHORIZATION FOR PRE-EMPLOYMENT INVESTIGATION" and "CERTIFICATION". On August 22, 1994 Leys was injured on the job in an auto accident. Out of fear of losing his job, he continued to work. On September 13, 1994 Leys had clocked out for the day when he was approached by security agent Phillip King, and was taken into a small room inside the WF office and was accused of stealing $ 20,000.00. After being searched and interrogated for 70 minutes, Leys was suspended without pay pending investigation. This incident took place in the presence of other co-workers. The following day, September 14, 1994, Leys returned to the WF office to get his paycheck and was again accused of stealing the $ 20,000.00 by Phillip King. While Leys was suspended, King went out and actually counted the ATM to find that there was no money missing, but that there was an AmSouth Bank paper error, which led to the "shortage". Ley's suspension was rescinded, but he was so hurt and embarrassed to the degree that he could not face his co- workers, much less do his job effectively.

B. Facts Pertaining to Case - Continued

Leys also filed a worker's compensation claim for his injury in his auto accident. His claim was denied for several weeks without reason. Leys hired Richard C. Shuleva as counsel and filed a slander suit against WF in the Circuit Court for Jefferson County, Alabama on September 13, 1996. WF answered the complaint and moved to remove the case to federal jurisdiction alleging diversity. This case was removed to the U. S. District Court on October 15, 1996. Next, WF filed for a motion to stay and raised arbitration as their defense. The District Court held that since Leys signed (but not dated) the application, and his job "surely involves interstate commerce", that Ley's claims would have to be arbitrated. During the very limited discovery, Ley's personnel file showed documents of the investigation in the form of a PRE-EMPLOYMENT BACKGROUND REPORT, where his credit was checked by King. Also, a document stating that searches on the person are not a condition of employment. And finally, documents in the form of worker's compensation database notes stating that "**Leys was terminated on September 13, 1994, and left under bad conditions**", and "**ee (employee) has been terminated. Was under investigation for loss of $ & never RTW (returned to work).**"

B. Facts Pertaining to Case - Continued

These notes explained why Ley's worker's compensation claim was denied for several weeks. At this point, Leys had other causes of action against WF with libel slander, negligence, Privacy Act violations, and Fair Credit Reporting Act violations. **WF reported that Leys was in fact terminated on September 13, 1994.** These later added claims happened on the day, or after Leys was interrogated / terminated (September 13, 1994). On January 28, 1998, as ordered by the District Court, Leys arbitrated his claims, but to no avail. The arbitral award was enforced by the District Court on August 31, 1998. This case was appealed to the Eleventh Circuit Court of Appeals on December 3, 1998, wherein the District Court's judgment was affirmed.

C. The District Court's Decision

1) <u>Compelling Arbitration</u>

Wells Fargo's arbitration clause reads as follows:

"If employed, I agree that any claim which I might assert against the Company arising out of or relating to my employment, other than worker's compensation claims, shall be finally settled exclusively by arbitration. The

B. The District Court's Decision

1) Compelling Arbitration - Continued

arbitration shall be expedited, without discovery. There shall be one arbitrator chosen by the American Arbitration Association and the arbitration shall be conducted in accordance with the American Arbitration Association rules. Any award to me shall be limited to the lesser of any actual lost wages, or an amount not to exceed six month's wages and, in an appropriate case, reinstatement. The costs of arbitration shall be shared equally between me and the Company and, if required, paid in advance."

Clearly, this "agreement" in whole or in part, contains limitations and penalties upon which the employee is not assured of a just and fair forum away from our courts. The District Court reasoned that this agreement is valid because **"...the agreement is in writing. And, despite Ley's protests to the contrary, the transaction at issue arose out of plaintiff's employment, which surely involves interstate commerce."** Never did the District Court address unconscionability of the clause, in that it severely limits remedies, and promotes financial hardship to the employee because of fee splitting. Here, the District Court compelled the arbitration agreement, when it, nor the parties to this case, knew what other claims would arise out of discovery. As stated earlier, discovery had not taken place yet, and other claims had yet to be found.

District Court's Decision

1) Compelling Arbitration – Continued

The District Court's judicial action precluded Leys from addressing "any claims" which he might assert against the WF in our courts. The broad language in the clause has been widely accepted in our courts to cover any claims, statutory or common law. But the clause fails to include pertinent language as to covering claims arising out of or relating to termination. *Miller vs. Public Storage Management, Inc. / Case No. 96-10670 (5th Cir. 1997)* and *Cole vs. Burns International Security Services / Case No. 96-7042 (D.C. 1997)* also *Paladino vs. Avnet Computer Technologies, Inc./ Case No. 96-2341 (11th Cir. 1998).* This language has been widely accepted by our courts to cover both employment and termination.

Wells Fargo's arbitration clause addresses any claim, which Leys might assert if he is **employed.** Since arbitration clauses are to share the same footing as other contracts, the clause must address what the contract and/or agreement is to cover. Ley's claim of slander, as well as the later discovered claims, relate and arose from his termination and should not have been arbitrated. Lastly, by the District Court compelling arbitration, not only did it relieve WF from invited error, in that termination was not covered in

District Court's Decision

1) Compelling Arbitration – Continued

the arbitration agreement, but it created a situation where Leys had no other choice but to arbitrate his claims and impose invited error upon himself because by arbitrating his claims, he now has no forum to seek relief, and the statute of limitations has expired. Here, an unconscionable result has occurred. The District Court erred in compelling arbitration when the clause is inherently unconscionable, limits remedies, provides financial hardship on the employee, and does not provide for claims arising or relating out of termination. This case is now being judged on after the fact outcomes, rather than the validity and fairness of the arbitration clause in its conception from the start. A miscarriage of justice is eminent.

2) Enforcing the Arbitral Award

On August 31, 1998, the District Court enforced the arbitral award. Earlier on when arbitration was compelled the District Court stated:

"...Hence, Wells Fargo's Motion to Compel Arbitration is due to be granted. But in order to avoid certain inevitable administrative hassles, the Court will treat the

District Court's Decision

2) <u>Enforcing the Arbitral Award</u> - Continued

motion as a motion for dismissal without prejudice. When the arbitration award is made, then either party may reactivate the case, *nunc pro tunc,* for such relief as he/it deems appropriate."

Leys construed this language to mean that there would still be the always fair forum of the court should arbitration fail. Leys was mislead. For once the case was reactivated, the only thing left to do was to procedurally "rubber stamp it." The opportunity to seek "such relief as he/it deems appropriate" obviously meant something else than it implied. Here, a miscarriage of justice is realized. This would not be the only time that the District Court would mislead Leys.

3) <u>Unique Circumstances Doctrine</u>

Although Leys had fired his counsel on August 21, 1998, Mr. Shuleva failed to withdraw from this case until November 6, 1998 (granted on December 15, 1998). This caused Leys not to receive any timely notifications from the District Court so he could prepare for his appeal. This, along with kidney stone surgery caused Leys to not timely file an appeal. Leys filed a motion for extension to file an

District Court's Decision - Continued

3) Unique Circumstances Doctrine

appeal, which was granted "Good cause shown, 30 days." The appeal was filed on December 3, 1998 and was met with a jurisdictional challenge by WF. The issue here was whether Ley's appeal was timely filed. It was late. The Eleventh Circuit held:

"...the court erred under Rule 4(a)(6) in granting Leys 30 days to appeal, rather than the 14 days, as allowed by the rule....By endorsing Ley's motion, GRANTED, 30 days, Good cause shown," the court misled Leys into filing an untimely notice..."

This case would not be where it is now had it not been for the "unique circumstances" doctrine. At the same token, this case should not be where it is now. Leys contends that the "unique circumstances" doctrine should apply, considering the awkward way this case has evolved.

D. Eleventh Circuit's Decision

On August 25, 2000, The Eleventh Circuit Court of Appeals affirmed the judgment of the District Court. The first issue is the compelling of arbitration. The Eleventh Circuit states:

D. Eleventh Circuit's Decision - Continued

"An employer may condition employment upon agreement to arbitrate **employment disputes**...The arbitration agreement in the Wells Fargo job application was plainly readable..."

There first must be a clear understanding of what an employment dispute consists of. Leys construed the clause to cover employment disputes such as being passed over for promotion, not getting vacation pay, not getting a raise. Never did Leys construe the agreement to mean that he was waiving his Seventh Amendment right to our courts. And contrary to the Eleventh Circuit's position, the arbitration agreement was plainly readable, but not plainly understandable. Leys only has a 12th grade education and is not schooled in "legal- eze". Had the clause been drafted containing simple language such as in, or *Miller vs. Public Storage Management, Inc. / Case No. 96-10670 (5th Cir. 1997),* and *Randolph vs. Green Tree Financial Corp. / Case No. 98-6055 (11th Cir. 1999),* then this would not be an issue today.

The Eleventh Circuit further states:

D. Eleventh Circuit's Decision - Continued

"...The agreement is not void simply because it required Leys to arbitrate, but reserved to Wells Fargo the option of suing in court...Nor is the agreement void for lack of a signature from a Wells Fargo representative..."

Here, "simply" is defeated by "preponderance." The application in general has no date, nor does the signature line underneath the arbitration clause. This is a contract and is to be on the same footings as other contracts per the Federal Arbitration Act. Further, the clause is inherently unconscionable in equity by limiting remedies, and providing financial hardship to the weaker adhering party. Fee splitting in particular is supported in *Shankle vs. B-G Maintenance Management of Colorado, Inc. / Case No. 97-1130 (10th Cir. 1999)*, and *Cole vs. Burns International Security Services, et al. / Case No. 96-7042 (D.C. 1997)*. In *Cole*, the Court held that:

"...can an employer require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrator's fees? We hold that it cannot."

The Eleventh Circuit goes on to state:

"...Further, Ley's slander claims arose from his

D. Eleventh Circuit's Decision – Continued

employment and were within the scope of the arbitration agreement…"

The **"controls of employment"** become a very critical issue here. Leys had clocked out for the day before security agent King approached him and held him for interrogation. Leys, was then suspended / terminated that same day. Leys never worked for WF after that. The claims later discovered all occurred after Leys was suspended / terminated. **Leys was not under the controls of employment when any of these claims actually transpired,** regardless of his termination date. Certainly Leys cannot be held to an employment agreement when he is not working for the company, or at the least, clocked out for the day. Further, Leys was not paid for the seventy minutes he was held and interrogated by King.

As far as slander being in the scope of the arbitration agreement, Leys contends that it is not. In *Powers vs. United States Postal Service, 671 F. 2d 1041 (7th Cir. 1982)* and *Baravati vs. Josephthal, Lyon & Ross, Inc., and Peter Sheib / Case No. 93-3647 (7th Cir. 1994). In Bravati,* the Court held that:

"A standard way in which federal courts make

D. Eleventh Circuit's Decision - Continued

federal common law is by adopting the law of the state whose law would govern in the absence of federal law....The states have richer bodies of common law than the federal courts do and it is desirable to minimize the number of different legal rules to which people are subject....Defamation is an area of state law, and the various defamation privileges are an integral part of the law of defamation...."

The Eleventh Circuit also states:

"We are concerned about the potential for unconscionability in Wells Fargo's arbitration clause, which couples the agreement to arbitrate with a limitation on liability to six month's salary or reinstatement. Under the law of this circuit, this limitation is clearly unenforceable when it precludes a plaintiff from vindicating federal statutory rights....In addition, forcing a plaintiff to bear the cost of high arbitration fees could unlawfully inhibit him from vindicating statutory rights...But we are not prepared, in this instance, to extend the rules of *Randolph* and *Paladino* into this case, when the employer in fact paid all the costs of arbitration, and Leys asserted common-law claims, not statutory rights."

D. Eleventh Circuit's Decision - Continued

After the fact outcomes is not the appropriate standard for judging the unconscionability of an arbitration agreement...This opinion by the Eleventh Circuit is very problematic. On one hand, the Court finds that the clause contains provisions and fees, which are the basis for unconscionability. Then, on the other hand, since the claims are not statutory rights claims, the scales of justice tilt greatly. For how can any court discriminate against a plaintiff's claims. Our own court system doesn't do this when we file suit when we are wronged. The arbitration clause clearly covers any claim, statutory or common-law. Why is it that arbitration changes the scheme of "Equal Justice Under The Law"? Our courts don't adhere to a policy of accepting only statutory right claims, and refusing common-law claims. This discrimination by our courts can only mean that arbitration is not being held and supported by our courts, at least to the extent of the welfare of public policy. Further, as stated earlier, the Eleventh Circuit has judged this arbitration issue on "an after the fact basis". In every case cited herein, the arbitration clause is based on the equity of the clause, before it is arbitrated, not after. And if a court below exercises bad judgment, then it becomes the procedural and moral duty of the appellate

D. Eleventh Circuit's Decision - Continued

courts and This Court to correct the record and solidify the statutory right in our 7th Amendment. The fairness and mutuality of the agreement must be considered **before** the issues are arbitrated. This case is not a "guinea pig". All of the pertinent case law and cases cited herein should be based on unconscionability on merits of the agreement itself. It is the only way a plaintiff is protected from committing unforeseen invited error, or any other result, which would attribute to an unconscionable outcome in their case.

The Eleventh Circuit also held in this case that:

"...the district court did not err in compelling arbitration of Ley's slander claim. As for Ley's objections to arbitration of his later-added claims, including statutory claims, Leys himself submitted the claims to arbitration; we will not grant relief for error invited by the appellant..."

Once again, as stated earlier, because the district court enforced the arbitration agreement providing that all claims must be arbitrated, Leys was forced to arbitrate all claims, not knowing that he would be committing invited error upon himself. The district court did not offer any

D. Eleventh Circuit's Decision - Continued

clarification in his ruling compelling arbitration. Nor was there any attempt to inform Leys of the consequences of arbitration.

The Eleventh Circuit also states that:

"Leys failed to show any misconduct by the arbitrator in failing to admit evidence because Ley's own counsel withheld the evidence from the arbitrator. As for the alleged lack of certain discovery, Leys failed to carry his burden of showing how the alleged lack prejudiced him. The district court did not err in confirming the arbitrator's award."

Wells Fargo's arbitration agreement reads in part:

"...There shall be one arbitrator chosen by the American Arbitration Association and the arbitration shall be conducted in accordance with the American Arbitration Association rules..."

The American Arbitration Association (AAA) rules at page 15, section 11 "Qualifications to Serve as Arbitrator and Rights of Parties to Disqualify Arbitrator" state:

" (i) Arbitrators serving under these rules shall be experienced in the field of employment law."

D. Eleventh Circuit's Decision - Continued

In this case the arbitrator, Ben F. Beckham's experience is listed by AAA as:

Profession- Business Law, Insurance, Negligence, and Commercial Real Property.

Experience- Primarily engaged in litigation of above-stated areas of law. Represent corporate and individual clients in all areas of business law. Represents insurance companies in subrogation and in the defense of automobile claims. Represents corporate clients in commercial real property lease disputes. Experience with automobile negligence cases since 1977.

It becomes painfully apparent that the arbitrator is "defense oriented" which is problematic to the neutrality of an arbitrator. The misconduct in this matter is that the arbitrator was not qualified to arbitrate this case at all. The defense orientation and lack of employment experience affected the judgment of the arbitrator and the outcome of the arbitration hearing altogether. Our courts have qualified judges who are experienced in all facets of law, which allow plaintiffs a fair forum in which to bring their claims and get an informed, qualified verdict. But, when an arbitration hearing cannot even be heard by a qualified

D. Eleventh Circuit's Decision - Continued

arbitrator to the matter(s) at hand, then the arbitral forum has failed, and any result from that forum would be tainted.

Turning attention to the alleged lack of discovery and the prejudice that resulted, there are several issues to address. First, the WF arbitration agreement is employee promulgated, and under AAA rules, the costs of arbitration and filing fees are all "considered paid". Yet, WF was sent letters from AAA contending that Leys had not properly filed his claim. The costs for Leys filing his claim was $7,000.00. WF was very aware of their arbitration agreement being employee promulgated, but neglected to inform AAA. This failure to disclose is considered a dilatory action, since it caused unnecessary delays in regards to depositions (one per party), and causing the arbitration not to take place until January 28, 1998, over a year from the date of the compelling of arbitration by the district court. Leys contends that this dilatory action by WF constitutes a waiver of arbitration. Second, there was a lack of regard for discovery by WF. Several times during the deposition of security agent Phillip King, non – responsive and evasive answers were continually given:

D. Eleventh Circuit's Decision - Continued

Q. Were there any handwritten notes, memorandum or by whatever named called, other than what has been represented as what is Exhibits 278-333?

A. I believe so, yes, sir.

Q. There are some other handwritten notes?

A. Yes, sir.

Q. Where are those, please?

A. I don't have a copy of them with me. I don't know where they are.

Q. Did you make those handwritten notes?

A. Yes, I did.

Q. Did any other persons in the process of doing this investigation for the company in this matter, did any other persons make handwritten notes that you're aware of?

A. I can't answer that question.

Q. Did you have those documents when you were trying to investigate this matter?

A. I specifically recall having one of those documents.

Q. Which was that?

D. Eleventh Circuit's Decision - Continued

A. Which was the document that Mr. Leys signed for forty thousand dollars from the Well Fargo vault, I believe on 8/19/94.

Q. Is that in these papers that I have here?

A. No, sir.

Q. Can you show me where in your report you reference that document you just spoke about?

A. Yes, sir, it is on Page 00283, fourth paragraph, eighth line.

Q. Read to me what you're referring to, please, sir.

A. "S/A King check through the armored vault and learned that Leys himself checked out the 40 K shipment for this machine on 8/19/94."

Q. All right, and you did not include that document in your investigative file?

A. No, sir, I did not.

Q. Is there a reason why you did not?

A. No, sir, there is not a reason.

Q. Did you yourself consider that document to be an important document in your investigation?

A. Yes, sir.

D. Eleventh Circuit's Decision - Continued

Q. Where would Mr. Smith and I find that document today?

A. I can't answer that question, sir.

Q. When you were finished with the document, what did you do with it?

A. I don't know that I ever had possession of it.

Q. Do you know whether or not Mr. Shotts or Mr. Norris had received training in conducting this type of audit?

A. I can't answer that question.

Q. The twenty thousand dollars that is ultimately paid to AmSouth Bank in March, 1995 is not the same twenty thousand dollars that is represented in Exhibit 289, date 8/29/94?

A. I can't answer that question, sir.

Q. Do you know whether or not Steve Shotts or Steve Norris could have conducted the same type of investigation that you conducted over that period of a week in September, 1994?

A. I can't answer that question, sir.

D. Eleventh Circuit's Decision - Continued

Also lacking were items of evidence in the list of exhibits and requests for production, which WF failed to bring to the arbitration hearing. The list of exhibits read in part:

"Dear Mr. Beckham:

Pursuant to your order, the following is Mr. Ley's list of exhibits:

1. Any and all documents produced by Wells Fargo, designated as (personnel file), 00001-00277.
2. Any and all documents produced by Wells Fargo, designated as (investigator's file), 00278-
3. Phillip Grant King's file folder 9440-302 and the contents thereof.
4. Wells Fargo's investigation file 9440-302.
5. The single manifest for 8/19/94.
6. The service invoice for 9/14/94.
7. The service invoice for 8/21/94.
8. The service invoice for 8/22/94.
9. Phillip Grant King's handwritten notes of his investigation.
10. The Reed Training School manual and audio tapes, as identified in the deposition of Phillip Grant King.
11. The Well Fargo policy manual and security manual, as identified in the deposition of Phillip Grant King.

Of these exhibits listed, WF failed to produce 9, 10, and 11. Because of the limited discovery in arbitration, unlike our courts, compliance of discovery was crucial for Leys to present his claims with backing evidence. Since WF didn't bring these items to the arbitration, Leys case would be

D. Eleventh Circuit's Decision - Continued

prejudiced. This is also bolstered in a letter from Ley's counsel to AAA about not only the dilatory issue of fees, but also WF lack of regard for complying with discovery. The letter reads in part:

"Throughout the months of September and October, you repeatedly sent me communications advising that the AAA was demanding that my client submit deposits.... Despite several Affidavits sent to you regarding my client's financial position and several requests by the undersigned requesting that the payment of those fees be postponed until after the hearing, the Association still demanded payment of said fees and suspended the hearing. Based upon all of the above, I had notified my client of the suspension and was frankly preparing to get this matter back in front of the Federal Court Judge.

You can then understand my surprise at receiving your October 27, 1997 letter on Wednesday, October 29, 1997 (which was seen by the undersigned on the evening of October 30th) where you have finally figured out that there are no required fees to be paid by my client. Frankly, since your letter does not indicate otherwise, I am still assuming that the hearing has been suspended. If it has not, you have put me in an incredibly awkward situation and I will **not** be able to attend the hearing scheduled for November 4, 1997.

Additionally, at the depositions of the parties, it was determined that we had not received the entire investigator's file, nor had all of the invoices for the months of August and September, 1994 been supplied. As I have not received same, this is a further reason for the inability to go forward with the arbitration hearing tomorrow."

E. Eleventh Circuit's Decision – Continued

It becomes apparent that the fee demands by AAA, whether stemming from WF as a dilatory action, or just coincidence, caused this arbitration to be suspended and then, at the eleventh hour, reactivated within 5 days of the arbitration hearing set for November 4, 1997. Leys was prejudiced for obvious reasons by the delays. Being lulled into inactivity, only to be sandbagged at the last minute. These are not the actions of a fair forum.

The Eleventh Circuit states in a footnote of its opinion:

"Leys argues certain issues for the first time on appeal, including the following: (1) The arbitration clause did not apply to disputes arising after he left Wells Fargo's employ; (2) He did not contemplate engaging in interstate commerce; and (3) The arbitrator never made a valid, complete, final award. Because these issues were not raised before the trial court, and because we are not convinced that "a miscarriage of justice" requires us to consider them, we will not rule on these issues."

Under *Narey v. Dean, 32 F.3.d 1521, 1526-27 (11th Cir.) 1994),* new issues may be brought before appellate courts:

" (1) if it involves a pure question of law, and if the refusal to consider it would result in a miscarriage of justice; (2)…the rule 1527 may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level; (3) …the rule does not bar consideration by the appellate court in the first

C. Eleventh Circuit's Decision – Continued

instance where the interest of substantial justice is at stake; (4) …a Federal appellate court is justified in resolving an issue not passed on below…where the proper resolution is beyond any doubt"; and (5) …it may be appropriate to consider an issue raised on appeal if that issue presents significant questions of general impact or of great public concern."

For exception **(1)**, arbitration clauses, which are broad and cover employment and termination, as in *Paladino, Cole, and Miller,* have been widely accepted in our courts. WF's arbitration clause fails to cover termination. Also Leys didn't contemplate engaging in interstate commerce when he applied for employment with WF. This is addressed in the FAA. Additionally, the arbitral award lacks the elements needed to avoid vacature, which are addressed at 9 U.S.C. Sec. 10 (4) and 5 U.S.C. Sec. 580. Finally, the arbitrator must be experienced in the field of law at issue per the FAA and AAA rules. Mr. Beckham is a business/insurance attorney. These provisions protect Leys from a tainted arbitral award which, coupled with the district court's enforcing the award, constitutes a clear miscarriage of justice.

For exception **(2)**, the information concerning the qualifications and experience of the arbitrator was not released until after the district court dismissed this case

D. Eleventh Circuit's Decision - Continued

with prejudice (August 31, 1998). Leys, being pro se, and his ex-attorney's untimely withdrawal from this case, sought to file his appeal with the Eleventh Circuit. The issues for vacature of the award could not be considered by the district court since jurisdiction was being considered by the appellate court. Until Ley's ex-counsel withdrew, he was not recognized by the AAA, hence the late discovery. For exceptions **(3)** and **(4)**, the issues raised for the first time on appeal are applicable to vacature, and Federal provisions that protect Leys from "tainted" arbitral awards. The Eleventh Circuit has already found the WF clause to contain unenforceable provisions, but based on circuit law, and not equity. Equity is applicable to the inherent validity of the clause because there is no circuit law that covers unconscionability with common law claims. Failure to do this would gravely prejudice justice to Leys. For exception **(5)**, WF's arbitration agreement is employee promulgated and is in affect for the thousands of its employees. The Eleventh Circuit has failed to utilize 9 U.S.C. Sec. 2, as equity must prevail as the standard. If the issue of the clause's equity is not resolved, and the courts continue to discriminate based on common law claims as opposed to statutory right claims, then the significant questions of

D. Eleventh Circuit's Decision – Continued

general impact and great public concern are valid issues in this case. Not only would the thousands of WF employees be subject to the current case law, but millions of working Americans everywhere.

REASONS FOR GRANTING THE PETITION

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Leys was not under the controls of employment in this matter. Also, this matter was arbitrated when it clearly should not have been. Such as in *Minor v. Wells Fargo/ Civil Action No. 94-0799(USDC Eastern Dist. LA),* or *Watkins v. Wells Fargo/ Case No. 96-145856-92(Tarrant County, TX District Court),* and *Trabal v. Wells Fargo/ Civil Action No. 98-858(USDC of New Jersey).* Protection against unconscionability should be afforded to all claims, otherwise arbitration proves to be an inferior forum.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted,

William E. Leys, Jr./ Pro se Petitioner
3823 San Juan Dr. Mobile, AL 36609 (334) 344-7330

APPENDIX A

William E. LEYS, Jr.
Plaintiff-Appellant/ pro se,

v.

WELLS FARGO ARMED SERVICE CORPORATION, et al, and PHILLIP KING,
Defendants-Appellees.

No. 98-6988

United States Court of Appeals,
Eleventh Circuit.

Appeal from the United States District Court for the Northern District of Alabama

---

(August 25, 2000)

Before EDMONSON, HULL and WILSON, Circuit Judges.

PER CURIAM:

William E. Leys, Jr., proceeding *pro se,* appeals from the district court's orders compelling arbitration, confirming the arbitrator's decision, and dismissing his action with prejudice. We affirm the judgment of the

district court.

BACKGROUND

When Leys applied for a job with appellee Wells Fargo Armored Service Corporation, he signed a job application containing the following arbitration agreement:

> "If employed, I agree that any claim which I might assert against the Company arising out of or relating to my employment, other than worker's compensation claims, shall be finally settled exclusively by arbitration. The arbitration shall be expedited, without discovery. There shall be one arbitrator chosen by the American Arbitration Association and the arbitration shall be conducted in accordance with the American Arbitration Association rules. Any award to me shall be limited to the lesser of any actual lost wages, or an amount not to exceed six month's wages and, in an appropriate case, reinstatement. The costs of arbitration shall be shared equally between me and the Company and, if required, paid in advance."

Leys accepted Wells Fargo's offer of employment and worked as an ATM guard in Alabama. King, a Wells Fargo security agent, accused Leys of stealing $20,000.00 from an ATM machine Leys serviced. Subsequent investigation revealed that a paperwork error had occurred and the $20,000.00 was not missing.

Leys sued King and Wells Fargo for slander, claiming the false and slanderous accusations of theft

caused him to be fired and subjected him to contempt, ridicule, and scorn among co-employees. The defendants filed a motion to compel arbitration and a motion to stay. The district dismissed Leys's action and compelled arbitration.

During arbitration, Leys added claims including invasion of privacy, breach of confidentiality, and violation of the Fair Credit Reporting Act. The arbitrator ruled that the defendants had no liability and ordered the defendants to pay all arbitration fees and expenses. The parties re-activated the case before the district court. The court granted the defendant's motion for dismissal with prejudice based on the arbitrator's award. Leys moved for reconsideration, and later moved to amend his complaint to add several causes of action. The district court denied both motions. This appeal followed.

DISCUSSION

Appellate Jurisdiction

As a threshold matter, we note that we have jurisdiction to entertain this appeal. The defendants argue Leys's notice of appeal was untimely. As discussed in this court's order of June 29, 1999, the "unique circumstances"

doctrine excuses Leys's untimely filing because the district court led Leys to believe that he had thirty days to file his notice of appeal.

Arbitration

We review the district court's order compelling arbitration *de novo*. See *McBro Planning & Triangle Elec. Constr. Co.*, 741 F.2d 342, 343 (11th Cir. 1984). In reviewing an order confirming an arbitral award, we review factual findings for clear error and legal conclusions *de novo*. See *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1311 (11th Cir. 1998). In construing arbitration agreements, we resolve any doubts in favor of arbitration. *See Moses H. Cone Memorial Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).[1]

---

[1] Leys argues certain issues for the first time on appeal, including the following: (1) The arbitration clause did not apply to disputes arising after he left Wells Fargo's employ; (2) He did not contemplate engaging in interstate commerce; and (3) The arbitrator never made a valid, complete, final award. Because these issues were not raised before the trial court, and because we are not convinced that "a miscarriage of justice" requires us to consider them, we will not rule on these issues. See Narey v. Dean, 32 F.3d 1521, 1526-1527 (11th Cir. 1994).

An employer may condition employment upon agreement to arbitrate employment disputes. *See, e.g., Ex parte McNaughton*, 728 So. 2d 592, 593 (Ala. 1998). . .The arbitration agreement in the Wells Fargo job application was plainly readable. *Cf. Southern Energy Homes, Inc. v. Ard*, __So. 2d__, 2000 WL 709500 (Ala. June 2, 2000) (enforcing arbitration provision that was the same type size as the rest of the disputed warranty). By accepting employment with Wells Fargo, Leys accepted the duty to arbitrate employment disputes. *See id.* ("A plaintiff cannot simultaneously claim the benefits of a contract and repudiate its [arbitration provisions]"). The agreement is not void simply because it required Leys to arbitrate, but reserved to Wells Fargo the option of suing in court. *See McNaughton*, 728 So. 2d at 599 (rejecting "mutuality" defense to arbitration agreement that employer did not have to follow). Nor is the agreement void for lack of a signature from a Wells Fargo representative. *See Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 659 and n.3 (11th Cir.) ("The [plaintiffs] are incorrect in arguing that the absence of the [defendant's] signature on the Customer Agreement proves a lack of mutuality of obligation."), *cert. granted, vacated sub nom. Smith Barney, Harris Upham & Co. v. Adrian*, 484 U.S. 909

(1987), and *aff'd in pertinent part*, 841 F.2d 1059, 1061 (11th Cir. 1988). Further, Leys's slander claims arose from his employment and were in the scope of the arbitration agreement. See, e.g., Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 883-84 (9th Cir. 1992) (ruling that when an employee was accused of stealing money at work, his slander claims were arbitrable).

We are concerned about the potential for unconscionability in Wells Fargo's arbitration clause, which couples the agreement to arbitrate with a limitation on liability to six months' salary or reinstatement. Under the law of this circuit, this limitation is clearly unenforceable when it precludes a plaintiff from vindicating federal statutory rights. See *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir.) (Title VII). In addition, forcing a plaintiff to bear the cost of high arbitration fees could unlawfully inhibit him from vindicating statutory rights. *See Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir. 1999) (Truth in Lending Act), *cert. granted*, __U.S. __, 120 S. Ct. 1552 (2000); *Paladino*, 134 F.3d at 1062. But we are not prepared, in this instance, to extend the rules of *Randolph* and *Paladino* into this case, when the employer in fact paid all the costs of arbitration, and Leys asserted common-law

claims, not statutory rights.

Therefore, the district court did not err in compelling arbitration of Leys's slander claim. As for Leys's objections to arbitration of his later-added claims, including statutory claims, Leys himself submitted the claims to arbitration; we will not grant relief for error invited by the appellant. Cf. Crockett v. Uniroyal, Inc., 772 F.2d 1524, 1530 n.4 (11th Cir. 1985) (ruling a party may not challenge invited error).

Leys failed to show any misconduct by the arbitrator in failing to admit evidence because Leys's own counsel withheld the evidence from the arbitrator. As for the alleged lack of certain discovery, Leys failed to carry his burden of showing how the alleged lack prejudiced him. The district court did not err in confirming the arbitrator's award.

AFFIRMED.

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
SOUTHERN DIVISION**

**WILLIAM E. LEYS, JR,
Plaintiff,**

v.

**WELLS FARGO ARMED SERVICE
CORPORATION, et al,
And PHILLIP KING,
Defendants.**

Civil Action No. 96-C-2677-S

MEMORANDUM OF OPINION TREATING MOTION TO COMPEL ARBITRATION AS MOTION TO DISMISS WITHOUT PREJUDICE AND GRANTING SAME

Defendant Wells Fargo Armored Service Corporation ("Wells Fargo") offers a nationwide network of first-line maintenance and cash replenishment services, linked by a computerized central dispatch operation. This case arises out of plaintiff William E. Leys's employment with Wells Fargo.

When he applied for employment, Leys signed a standard form entitled, "Certification." Among other things, in the certification, the following provision appears:

> If employed, I agree that any claim which I might assert against the Company arising out of or related to my employment...shall be settled exclusively by arbitration. The arbitration shall be expedited, without discovery. Any award to me shall be limited to the lesser of any actual lost wages, or an amount not to exceed six months wages and, in an appropriate case, reinstatement. The costs of arbitration shall be shared equally between me and the Company and, if required, paid in advance.

Defendant Exhit (DX1), Employment Application, p.4.

By signing the Certification, an applicant acknowledges that she/he has been advised of the right to consult an attorney, but that in any event the applicant "will not be offered until the application is signed and returned." Id. The Certification concludes with the provision: "My signature below signifies that I have completely read, and fully understand and agree to all of the above." id.

Leys was employed by Wells Fargo as a ATM guard on August 26, 1994. As an ATM guard, his duties included transporting money to automatic teller machines,

resupplying the machines, collecting cash and check deposits and credit cards from machines. Leys serviced an ATM machined owned by AmSouth Bank, which has branches in Alabama, Georgia, and Florida.

Plaintiff alleges that within the first nine months of his employment, he was slandered by his supervisor Phillip King, in the presence of his co-workers. King allegedly accused Leys of stealing $20,000.00 from Wells Fargo. Leys avers that subsequent investigation revealed that in fact the theft of which he had been accused was simply a "paperwork error." Plaintiff's Complaint, p.2.

II

On September 13, 1996, Leys filed this action in the circuit Court of Shelby County, Alabama. The case was timely removed to this Court based on the diverse citizenship of the three parties. Wells Fargo has now moved the Court to Compel Arbitration and to stay this action pending arbitration.

Under the Federal Arbitration Act, 9 U.S.C. Sec. 2, Leys's slander action must be submitted to arbitration if the

agreement is in writing, and the relevant contract evidences a transaction involving interstate commerce. Southland Corp. V. Keating, 465 U.S. 1 (1984).

Here, the agreement is in writing. And, despite Leys's protests to the contrary, the transaction at issue arose out of plaintiff's employment, which surely involves interstate commerce.

Hence, Wells Fargo's Motion to Compel Arbitration is due to be granted. But in order to avoid certain inevitable administrative hassles, the Court will treat the motion as a motion for dismissal without prejudice. When the arbitration award is made, then either party may reactivate the case, *nunc pro tunc*, for such relief as he/it deems appropriate.

DONE this 31st day of December, 1996.

/s/ U.W. Clemon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIAM E. LEYS, JR.,
Plaintiff,

Vs.

WELLS FARGO ARMED SERVICE CORPORATION,
et al,
And PHILLIP KING,
Defendants.

CIVIL ACTION NO. CV-96-C-2677

DISSMISSAL ORDER

Based on the decision of the arbitrator in this case, this cause of action is hereby DISMISSED with prejudice.

DONE this 31st day of August 1998.

/s/ U.W. Clemon
UNITED STATES DISTRICT COURT